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In the

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1614

HARPER SIBLEY, JR.,

Petitioner,

v.

TANDY CORPORATION, ET AL,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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INDEX

	Page
Opinion Below	1
Jurisdiction	1-2
Questions Presented	2
Statutory Provisions Involved	2
Statement of the Case	3-6
Reasons for Granting the Writ	6-23
Conclusion	23

Appendix:

1. Arbitration Opinion of the United States District Court for the Northern District of Texas, Dallas Division A-1–A-3
2. Principal Opinion of the United States Court of Appeals for the Fifth Circuit A-4–A-13
3. Opinion of the United States Court of Appeals for the Fifth Circuit, Denying Rehearing A-14–A-16

CITATIONS
Cases

Page

A. & E. Plastik Pak Co., Inc. v. Monsanto Co.,
396 F.2d 710 (9th Cir. 1968) 9n

Aimcee Wholesale Corp. v. Tomar Products, Inc.,
21 N.Y.2d 621, 289 N.Y.S.2d 968 (1968) 9n

Alexander v. Gardner-Denver Company,
415 U.S. 36 (1974) 21

American Safety Equipment Corp.
v. J. P. Maguire and Co. v. Hickok Mfg. Co., Inc.,
391 F.2d 821 (2d Cir. 1968) 9n

Ayres v. Merrill Lynch, Pierce, Fenner & Smith,
538 F.2d 532 (3rd Cir. 1976), *cert. denied*—U.S.— 7n, 20

Borel v. United States Cas. Co.,
233 F.2d 385 (5th Cir. 1956) 22n

Bullen v. DeBretteville, 239 F.2d 824
9th Cir. 1956), *cert. denied* 353 U.S. 947 ..... 22n

Collins Radio Company v. Ex-Cell-O Corporation,
467 F.2d 995 (8th Cir. 1972) 8

Colonial Realty Corp. v. Bache & Co.,
358 F.2d 178 (2d Cir. 1966) 7n

Danford v. Schwabacher, 342 F.Supp. 65
(N.D. Ca. 1972) 7n

Frier Industries, Inc. v. Glickman, ¶94,845 Fed. Sec. L. Rep.
[1974-75 Transfer Binder] (S.D.N.Y. 1974) 8, 11

Galt v. Libbey-Owens-Ford Glass Co.,
376 F.2d 711 (7th Cir. 1967) 19-20

Loux v. Rhay, 375 F.2d 55 (9th Cir. 1967) 22n

Page

Lubin v. Chicago Title and Trust Company,
260 F.2d 411 (7th Cir. 1958) 22n

Macchiavelli v. Shearson, Hammill & Co., Inc.,
384 F.Supp. 21 (E.D.Ca. 1974) 8-9, 11

Maheu v. Reynolds & Co., 282 F.Supp. 423
(S.D.N.Y. 1968) 7n

Moran v. Paine, Webber, Jackson & Curtis,
389 F.2d 242 (3rd Cir. 1968) 7n

Nisbet v. Van Tuyl, 224 F.2d 66 (7th Cir. 1955) 22n

Newman v. Shearson, Hammill & Co., Inc.,
383 F.Supp. 265 (W.D. Tex. 1974) 7n

Pawgan v. Silverstein, 265 F.Supp. 898
(S.D.N.Y. 1967) 7n

Proctor & Gamble Defense Corp. v. Bean,
146 F.2d 598 (5th Cir. 1945) 22n

Prudential Petroleum Corp. v. Rauscher, Pierce & Co., Inc.,
281 S.W.2d 457 (Tex. Civ. App. 1955) writ ref'd n.r.e. 15

Reader v. Hirsch & Co., 197 F.Supp. 111
(S.D.N.Y. 1961) 7n

Sam Reisfeld & Son Import Company v. S. A. Eteco,
530 F.2d 679 (5th Cir. 1976) 8, 11

Sandor Petroleum Corp. v. Williams, 321 S.W.2d 614
(Tex. Civ. App. 1959) writ ref'd n.r.e. 14, 15

Shapiro v. Jaslow, 320 F.Supp. 598 (S.D.N.Y. 1970) 7, 7n, 13

Sibley v. Tandy Corporation, 543 F.2d 540
(5th Cir. 1976) 1, 6, 8, 10, 12, 22n

Starkman v. Seroussi, 377 F.Supp. 518
(S.D.N.Y. 1974) 7n

Stockwell v. Reynolds & Co., 252 F.Supp. 215
(S.D.N.Y. 1965) 8, 9, 13

Tcherepnin v. Knight, 389 U.S. 332 (1967) 19

Wilko v. Swan, 346 U.S. 427 (1953) 7n, 20, 21, 22-23, 23

Statutes

	Page
9 U.S.C. §3	2, 7n, 13, 22-23
15 U.S.C. §77n	7n
15 U.S.C. §78cc(a)	2, 4, 7n, 13, 22-23
15 U.S.C. §78j	3
28 U.S.C. §1254(1)	2
28 U.S.C. §1291	4, 12n
28 U.S.C. §1292(b)	4, 12n

In the

Supreme Court of the United States

OCTOBER TERM, 1977

No._____

HARPER SIBLEY, JR.,

Petitioner

v.

TANDY CORPORATION, ET AL.,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Harper Sibley, Jr. respectfully prays that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on December 3, 1976 and on February 18, 1977.

OPINIONS BELOW

The principal opinion of the Court of Appeals is reported at 543 F.2d 540 (5th Cir. 1976); it also appears in the appendix hereto, as does the opinion denying rehearing, which is not reported. The opinion of the District Court denying respondent's arbitration motion is also included in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on December 3, 1976. A timely petition for rehearing was denied,

with opinion, on February 18, 1977, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the decision of the Court of Appeals establishes an unworkable and potentially wasteful standard for determining the arbitrability of disputes involving both arbitrable and nonarbitrable issues?

2. Whether the decision of the Court of Appeals improperly reconciles the federal policy favoring arbitration with that precluding a contractual waiver of the right to litigate securities fraud claims?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 15:

§78cc(a). Validity of Contracts

> Any condition, stipulation or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

United States Code, Title 9:

§3. Stay of Proceedings Where Issue Therein Referable to Arbitration

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

STATEMENT OF THE CASE

Petitioner Harper Sibley, Jr., on his own behalf and as the contractually-stipulated representative of the former shareholders of P. J. Parker, Inc., obtained a favorable jury verdict against respondent Tandy Corporation for securities fraud in violation of §10(b) of the Exchange Act, 15 U.S.C. §78j, and Rule 10b-5 promulgated thereunder[1]; this verdict also vindicated petitioner's state-law claims of fraud, conversion, and specific performance of a contract. (A. 9-60, 90-100)

Petitioner's complaint, filed June 12, 1973, derived from respondent's June 4, 1971 acquisition of P. J. Parker, Inc. and its wholly-owned subsidiary, Hickok Manufacturing Company. Through Sibley, the former P. J. Parker, Inc. shareholders sought actual and punitive damages for respondent's fraudulent scheme to obtain P. J. Parker, Inc. and Hickok for two-thirds of the represented price, a scheme culminating in respondent's conversion of 33,281 shares of Tandy common stock held in escrow pending the completion of an acquisition audit.[2]

In its answer, respondent denied petitioner's allegations and counterclaimed for the escrowed shares, charging that petitioner had breached the acquisition agreement. (R. 54-76) Relying upon an arbitration provision in the same agreement, respondent simultaneously (A. 2) moved for arbitration of the non-fraud issues and a stay of that part of the court proceedings not

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[1]Jurisdiction was further based on diversity, petitioner being a citizen of Florida and respondent being a Delaware corporation with its principal place of business in Texas.

[2]Fort Worth National Bank, a defendant in the trial court, is merely a stakeholder for petitioner and respondent; Fort Worth National Bank holds the escrowed Tandy stock as escrow agent and has not participated in this litigation.

involving any such issues, which respondent conceded were not arbitrable. (A. 63, 68) The trial court denied respondent's motion on the ground that the nonarbitrable issues were "so intertwined" with the arbitrable issues that to submit any part of the dispute to arbitration "would be to violate the mandate" of §29(a) of the Exchange Act, 15 U.S.C. §78cc(a) (A. 91), which renders void antecedent agreements to arbitrate claimed violations of the Exchange Act, like those alleged herein by petitioner. Respondent neither appealed that ruling under 28 U.S.C. §1291 nor asked the trial court to certify its ruling for interlocutory review under 28 U.S.C. §1292(b), and the parties thereupon proceeded with discovery and eventually a 10-day jury trial (October 21-November 1, 1974).

This dispute has always turned upon what petitioner contends was a variance between respondent's preacquisition representations and its postacquisition conduct. 33,281 shares of Tandy stock, one-third of the represented purchase price to be paid to P. J. Parker, Inc., were held in escrow pending an audit of the June 30, 1971 financial statements of P. J. Parker, Inc. by respondent's accountants; the purpose of the audit was to verify that those financials met a net-worth warranty that was part of the acquisition agreement. If the audited net worth were to fall below that warranted figure, the agreement provided that respondent would be entitled to retrieve $1.96 of its stock (at an agreed value) from the escrow account for every $1.00 of net-worth deficit. (A. 1984, 1769)

Petitioner has claimed that respondent fraudulently induced the execution of the acquisition agreement by the shareholders and schemed to prepare financial statements of

P. J. Parker, Inc. that would show an audited net worth less than the warranted figure, thereby giving rise to the appearance of a breach of contract by petitioner and ostensibly permitting respondent to recover the escrowed stock. Petitioner's trial pleadings further contended that this scheme was advanced by three critical preclosing misrepresentations by respondent as to the manner in which the net-worth verification would proceed: (1) inventory pricing would correspond with the pricing practices of P. J. Parker, Inc., as reflected in the December 31, 1970 certified Parker financial statements; (2) certain P. J. Parker, Inc. expenditures for computer software (referred to as the "Touchette" account) would be capitalized, and would not be subtracted from net worth; and (3) the 1971 calendar-year accruals for annually-recurring payments for taxes, fringe benefits, insurance and vacation pay would only be prorated for the 1971 calendar year. (A. 93 — Amended Complaint) Finally, petitioner's trial pleadings alleged that respondent acted with malice and in bad faith in causing the impoundment of the escrowed stock. (A. 93) This act, petitioner contends, consummated the fraud and gave rise to a conversion of the escrowed stock by respondent.

The jury trial resulted in answers to special interrogatories favorable to petitioner (A. 145-153) after 10 days of testimony from 22 witnesses and the introduction of more than 100 documentary exhibits. In particular, the jury found that each of the three misrepresentations had been made (A. 145; special issue 11) with no intention of fulfillment (A. 149; special issues 12-13), that each was material (A. 150; special issues 14-15), and that each was relied upon (A. 150; special issues 16-17).

The jury also vindicated petitioner's claim of malicious and bad faith impoundment (A. 147: special issues 9-10A), and awarded $3,000,000 in exemplary damages (A. 147: special issue 10A).

The trial court awarded judgment to petitioner of $463,853.93 in actual damages, plus delivery of the 33,281 escrowed Tandy shares. Petitioner appealed the trial court's denial of exemplary damages and its erroneous measure of actual damages, and respondent cross-appealed on liability and arbitrability. Without reaching the merits, the Fifth Circuit reversed and remanded because it viewed petitioner's arbitrable and nonarbitrable claims as "dependent" and only "to some degree intertwined and overlapping," 543 F.2d at 544 rather than being "so intertwined" as to preclude arbitration. The remand order was that trial of petitioner's fraud claims should be stayed pending arbitration of unspecified "contractual disputes." 543 F.2d at 544.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW ESTABLISHES AN UNWORKABLE AND POTENTIALLY WASTEFUL STANDARD FOR DETERMINING ARBITRABILITY OF DISPUTES INVOLVING BOTH ARBITRABLE AND NONARBITRABLE ISSUES.

A. The law before and after the opinion below.

This controversy involves federal securities fraud issues as

well as issues of breach of contract, common law fraud and conversion.

Until now, the law has been clear that federal securities fraud claims are not arbitrable,[3] while nonsecurities fraud claims are arbitrable, and that suits which include both types of issues are not arbitrable, in whole or in part, if those issues are "impractical, if not impossible" to separate. *Shapiro v. Jaslow*, 320 F.Supp. 598, 600 (S.D.N.Y. 1970).

Until now, when a trial court has been confronted with mixed arbitrable and nonarbitrable issues, the *Shapiro* test has necessitated an inquiry into the underlying question of whether any of the same facts affect both the arbitrable and the nonarbitrable legal theories with the result that a dispute must be tried in its entirety and not arbitrated, if the arbitrator charged with deciding

[3]Section 29(a) of the Exchange Act, 15 U.S.C. §78cc(a), voids any contractual condition requiring a party to a securities transaction to waive compliance with any other provision of that Act. This Court has interpreted §14 of the Securities Act (15 U.S.C. §77n), the counterpart of §29(a) of the Exchange Act, to prohibit enforcement of an agreement to arbitrate a claimed violation of the Securities Act. *Wilko v. Swan*, 346 U.S. 427 (1953). Other courts have reasoned that §29(a) of the Exchange Act and the logic of *Wilko* similarly prohibit arbitration of alleged violations of the antifraud provisions of the Exchange Act. *Ayres v. Merrill Lynch, Pierce, Fenner & Smith*, 538 F.2d 532, 536-37 (3d Cir. 1976), *cert. denied*, —— U.S. ——; *Colonial Realty Corp. v. Bache & Co.* 358 F.2d 178, 183, n. 5 (2d Cir. 1966); *Moran v. Paine, Webber, Jackson & Curtis*, 389 F.2d 242, 245 (3rd Cir. 1968); *Newman v. Shearson Hammill & Co., Inc.*, 383 F.Supp. 265 (W.D. Tex. 1974); *Starkman v. Seroussi*, 377 F.Supp. 518 (S.D.N.Y. 1974); *Danford v. Schwabacher*, 342 F.Supp. 65 (N.D. Ca. 1972); *Pawgan v. Silverstein*, 265 F.Supp. 898 (S.D.N.Y. 1967); *Shapiro v. Jaslow*, 320 F.Supp. 598 (S.D.N.Y. 1970); *Maheu v. Reynolds & Co.*, 282 F.Supp. 423 (S.D.N.Y. 1968); *Reader v. Hirsch & Co.*, 197 F.Supp. 111 (S.D.N.Y. 1961).

Section 3 of the Federal Arbitration Act requires a stay of litigation "if the issue [sic] involved in such suit is referable to arbitration under [an] agreement" between the litigants. 9 U.S.C. §3. This statute wrongly assumes that all disputes consist of a single issue which is either arbitrable or nonarbitrable.

the arbitrable non-fraud questions would have to deal with many of the same facts as would the court charged with deciding the federal securities fraud questions. *Stockwell v. Reynolds & Co.*, 252 F. Supp. 215 (S.D.N.Y. 1965). Such a test was applied by the trial court in the instant case. (A. 84-86)

Until now, it was settled that determinations of arbitrability were within the trial court's sound discretion. *Collins Radio Company v. Ex-Cell-O Corporation*, 467 F.2d 995, 1000 (8th Cir. 1972); *Sam Reisfeld & Son Import Company v. S. A. Eteco*, 530 F.2d 679, 681 (5th Cir. 1976).

Now, the opinion of the Fifth Circuit has upset this relatively stable state of the law by fashioning two unprecedented rulings. First, the Fifth Circuit has rejected the notion of deferential treatment of trial court determinations of arbitrability, in favor of a completely *de novo* appellate determination, notwithstanding the passage of literally years of litigation and full resolution of the merits of the controversy by jury trial. In addition, the Fifth Circuit has superimposed upon the *Shapiro* test an inscrutable requirement that a dispute be deemed (i) wholly nonarbitrable if the arbitrable and nonarbitrable issues are "intertwined in the legal sense" (543 F.2d at 543), but (ii) partly arbitrable if those issues "are [only] to some degree intertwined and overlapping" or "dependent" (543 F.2d at 543-544).

The impact of these errors is profound. Situations abound in which arbitrable claims are joined with nonarbitrable claims and in which contractual arbitration clauses are involved. See, *e.g.*, *Frier Industries, Inc. v. Glickman*, ¶94,845 Fed. Sec. L. Rep. [1974-75 Transfer Binder] (S.D.N.Y. 1974); *Macchiarelli v. Shearson, Hammill & Co., Inc.*, 384 F.Supp 21,

30 (E.D. Ca. 1974); *Stockwell v. Reynolds*, *supra*. With the widespread use of form agreements containing arbitration clauses in the brokerage industry, it is predictable that arbitrable and nonarbitrable claims will continued to be joined — frequently. And it is not at all unreasonable to suppose that many commercial transactions involving securities (acquisitions, mergers, compensation programs, etc.) and providing for arbitration of disputes will eventually present both arbitrable questions and questions of securities fraud. In all such cases, a clear, predictable and workable standard for deciding (and for reviewing the decision of) arbitrability issues is absolutely critical to the reconciliation of the aims of both the anti-waiver provisions of the securities fraud statutes and the arbitration statute.[4] A standard which is so unclear as always to require appellate review, or which in virtually every instance is to be applied *de novo* on appeal, will necessarily have one of two failings: either it will fail to keep claims out of the courts and thereby fail to achieve the economies thought to flow from arbitration, or it will discourage the use of arbitration clauses and thereby relegate all disputes to judicial resolution.

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[4]The instant decision has an impact far broader even than the securities world. Another type of nonarbitrable claim is one arising under the antitrust laws of the United States. See *Aimcee Wholesale Corp. v. Tomar Products, Inc.*, 21 N.Y.2d 621, 289 N.Y.S.2d 968 (1968); *American Safety Equipment Corp. v. J. P. Maguire and Co. v. Hickok Mfg. Co., Inc.*, 391 F.2d 821 (2d Cir. 1968); *A. & E. Plastik Pak Co., Inc. v. Monsanto Co.*, 396 F.2d 710 (9th Cir. 1968). District Courts in the Fifth Circuit will be compelled to apply the decision in the case *sub judice* to disputes mixing antitrust claims and arbitrable claims, and will undoubtedly find themselves equally perplexed and second guessed in doing so.

B. The distinction between "legal intertwinement" and "somewhat intertwined."

The new Fifth Circuit policy — *de novo* appellate determinations of whether arbitrable and nonarbitrable issues are "legally intertwined" (nonarbitrable), or merely "to some degree intertwined and overlapping" (arbitrable) — is, of course, without substance. The test has no real value either for practitioners or trial courts who must, respectively, advise clients and rule regarding whether to arbitrate, at the risk of finding their judgments overturned after years of extensive discovery and litigation.

All the more deleterious are the effects of the Fifth Circuit's "test" when considered in light of its additional holding — an interlocutory appeal from an order denying a motion to stay pending arbitration is neither appropriate nor required.[5] 543 F.2d at 542. Without a relatively quick determination that arbitration is required, the economies of time and money in the arbitration process become as they are in this case — non-existent. On the other hand, to require arbitration when, in fact, the anti-waiver provisions of the federal securities laws would preserve the right to trial is eventually to require at least two proceedings when only one is either necessary or appropriate.[6] Something more than appellate sorcery must be

[5]Should this Court issue its writ this issue of appealability of orders staying (or not staying) litigation pending arbitration begs for clarification, especially in view of the Fifth Circuit's insistence upon a *de novo* determination of the question.

[6]By virtue of the Fifth Circuit's opinion, there is a possibility of at least three proceedings: the original trial, the arbitration now required, and a trial of the federal securities and common law fraud claims after arbitration. By any rational assessment, such a result is absurd.

relied upon to resolve with efficiency the vast number of questions of arbitrability arising from disputes including both arbitrable and nonarbitrable issues; the Fifth Circuit's distinction between "legal intertwinement" and "somewhat intertwined" is no help to the trial courts which must make these ever-so-critical arbitrability determinations. Rather, any fair reading of the Fifth Circuit opinion reveals more propensity to turn a quotable phrase than to analyze, as did the trial court, the question of whether the arbitrator and the court would be reviewing the same evidence. (See pp. 13-19, *infra*)

C. *De novo* determination by the appellate court.

But even the untenable distinction made by the Fifth Circuit would not be so harmful if the appellate court did not also hold itself out as the sole arbiter of the issue. The Fifth Circuit failed to find that the trial court had abused its discretion in deciding to try the case — even while citing a number of cases illustrating the discretionary prerogative of the trial court in this area. *Frier Industries Inc. v. Glickman*, ¶94,845 Fed. Sec. L. Rep. [1974-75 Transfer Binder] (S.D.N.Y. 1974), *supra; Macchiavelli v. Shearson, Hammill & Co., Inc.*, 384 F.Supp. 21, *supra; Sam Reisfeld & Son Import Co. v. S. A. Eteco*, 530 F.2d 679, *supra.*

There are several practical advantages to be gained from giving the trial court discretion in making the difficult choice between arbitration and trial in cases involving both securities fraud and nonarbitrable issues. In the first place, the trial judge can decide this question at any of a number of times (utilizing pleadings, amended pleadings, hearings and whatever discovery the record contains) that will still permit realization of the

economies of arbitration.[7] Secondly, for an appellate court to arrogate the right to review *de novo* what the trial court decided years before and reverse and remand for arbitration after a full trial on merits reveals an attachment for arbitration not *because of* "considerations of judicial economy" (543 F.2d at 544) but rather *irrespective of* any such considerations. Finally, no possible advantage derives from making the parties proceed (either with litigation or arbitration) under the cloud of *de novo* review. If the appellate court is to be free to make the determination afresh (and on a completely inscrutable standard) then the appellate court should decide the issue before either litigation or arbitration is advanced.[8] To let stand the uncertainty created by the decision below is to guarantee but one unfortunate result: no practitioner in his right mind will let his client enter into an agreement providing for arbitration where there exists even the remote chance of becoming embroiled in years of litigation, including certain appellate review, just on the question of which forum should be used.

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[7]One pitfall of the *de novo* approach is illustrated by the appellate court's failure to understand the issues as well as the trial judge. The principal opinion of the Fifth Circuit assumed that respondent had "by a timely motion" moved to stay all court proceedings pending arbitration. In fact, Tandy's motion did not ask to stay trial of fraud issues, but only to arbitrate the so-called non-fraud issues. (A.63) On petition for rehearing, the Court of Appeals disingenuously covered its tracks, if you will, by holding that — an unheralded prayer in a reply brief was an acceptable substitute for a wholesale motion to stay — contrary, we might add, to the requirements of Rule 7(b)(1) of the Federal Rules of Civil Procedure.

[8]The absence of any requirement for interlocutory appeal is perhaps the most dangerously wasteful aspect of *de novo* review after trial (or after arbitration). See n. 5, *supra*, and accompanying text. It encourages the party seeking arbitration to forego all attempts at interlocutory review (under either §1291 or §1292(b) of Title 28), for it provides such parties with the luxury of a possible free look at a jury verdict — which can be overturned by a quick stroke of an appellate court pen, sending the case to arbitration.

This Court should reaffirm the rule of *Shapiro v. Jaslow* and *Stockwell v. Reynolds*, and the duty of the trial court to analyze, as did the trial court here, the degree to which overlapping legal and factual disputes will be decided in a trial (or by an arbitrator). This analysis must enjoy a presumption of validity, subject to reversal for abuse of discretion. It must not be subject to facile reversal by an appellate court perceiving itself capable of distinguishing between "legal intertwinement" and "somewhat intertwined."

D. Application of the *Shapiro* and *Stockwell* rules.

While citing the *Shapiro* and *Stockwell* cases, the Court of Appeals completely misapplied them, and in doing so satisfied neither the ends of §29(a) of the Exchange Act nor those of §3 of the Federal Arbitration Act. Apparently proceeding on the assumption that all facts bear labels such as "fraud," or "contract," or "conversion," the Fifth Circuit implicitly concluded that arbitration will not require the arbitrator to hear any of the evidence which previously persuaded a jury that in converting the escrowed stock, respondent worked a fraud on the shareholders of P. J. Parker, Inc. Nothing in either appellate opinion undertakes to segregate this evidence; the parties have not received even a hint as to what facts, if any, must be withheld from the arbitrator because they are "fraud" facts.

There is an obvious explanation for the Fifth Circuit's silence on this matter: the "fraud" facts, the "contract" facts and the "conversion" facts are one and the same. A few illustrations make the point:

1. *Inventory Pricing*. The jury found that respondent had represented that the acquisition audit would price inventory at June 30, 1971, by the same methods as had been used in the December 31, 1970 audit. (A. 148; issue 11(a)) This finding

was essential to petitioner's fraud case, because the representation was plainly false. (Issues 1, 24 and 25; A. 323-324, 487-488, 508-510, 792, 794, 823, 960, 991, 1291, 1293)

The jury also found, however, that the agreement did not permit the massive inventory writedown[9] taken by respondent, and that the acquisition audit therefore improperly priced inventory. (A. 145, 153; issues 1, 24 and 25)

All these findings (issues 1, 11(a), 24 and 25) established that respondent's contract counterclaim (to capture the escrowed stock) was untenable, because it was in part based on the inventory writedown, and that respondent's impoundment of the escrowed stock was a conversion. [See *Sandor Petroleum Corp. v. Williams*, 321 S.W.2d 614 (Tex.Civ.App. 1959) writ ref'd n.r.e., holding that a conversion arises from a wrongful interference with another's property, even where that interference is based on a claimed contractual right that is later proven invalid.] The same evidence supported all these findings. (A. 312-313, 317-319, 323-324, 335-336, 369-370, 431-432, 536, 702, 708-714, 736, 761, 1132, 1352-53, 1367)

An arbitrator will necessarily hear this evidence, just as a court and jury already have.

2. *Touchette*. The jury found that the respondent represented that costs[10] associated with a purchase of computer software from a company called "Touchette" would not be subtracted from the net worth of P. J. Parker, Inc. for purposes of the acquisition audit. (A. 148; issue 11(b)) This finding was part of and essential to petitioner's fraud verdict, because the repre-

[9] $331,492 (PX 18; A. 1849).

[10] $93,721 (A. 384, 499-502, 1879).

sentation was undisputedly false. (PX 18; A. 1842, 384)

A similar jury finding undermined respondent's claim that it was entitled to charge the Touchette expenses against Parker's net worth, as it did. (A. 146-47; issue 7)

Both these findings (issues 7 and 11(b)) served (i) to repudiate respondent's counterclaim for breach of contract, because it was in part based on subtracting the Touchette expenses from net worth, and (ii) to establish petitioner's claim of conversion — if respondent had no contractual right to the escrowed stock, the impoundment was a conversion. See *Sandor v. Williams*, *supra*, and *Prudential Petroleum Corp. v. Rauscher, Pierce & Co., Inc.*, 281 S.W.2d 457 (Tex.Civ.App. 1955) writ ref'd n.r.e. The same evidence supported both findings. (A. 308-310, 312, 499-502, 714-715, 1879)

An arbitrator will necessarily hear this evidence, just as a court and jury already have.

3. *Insurance and Vacation Pay*. The jury found that respondent represented that in accordance with past Parker practice, these annually recurring expenses (for union employee life and hospitalization insurance and management vacations) would only be prorated for the 1971 calendar year in preparation of the June 30, 1971 audit. (A. 148; issues 11(c) and 11(d)) Those findings were essential to and part of petitioner's fraud verdict, because the representations were false. (The acquisition audit charged $486,016 and $65,000 to net worth for insurance (A. 1260) and vacation pay (A. 1842), respectively, even though past practice had been a $12,000 annual charge for insurance (A. 1208-1209, 555-556) and no accrual for vacation pay (A. 1045, 1465).

The jury also found that the acquisition audit departed from the parties' agreement in its treatment of insurance and vacation pay. (Issues 3-6, 20, 22, 23; A. 145-146, 151-153)

All these findings undermined respondent's contract counterclaim, which was based, in part, on charging Parker's net worth with these unfounded insurance and vacation pay accruals, and validated petitioner's claim of conversion. The same evidence supported all these findings. (A. 369-371, 385, 553, 555-56, 561, 702-703, 716-717, 763, 1132, 1045, 1208-09, 1438-39, 1465-67, 1478, 1495-97, 1546-47).

An arbitrator will necessarily hear all this evidence, just as a court and jury already have.

4. *False Inventory Certificate.* In order to get its accountants (Price Waterhouse & Co.) to give a clean opinion with respect to the inventory valuation on the Parker financials prepared for audit by respondent, respondent delivered to Price Waterhouse a document which respondent described as proof of the fact that it had correctly valued the Parker inventory, in accordance with past Parker pricing practices. (PX 41) Without such a document Price Waterhouse would never have issued its audit, certifying that the inventory valuation was correct (A. 1398-1401), and the inventory-deficiency portion of Tandy's counterclaim would have failed.

This document was proven at trial to have been completely phony — fraudulent, if you will. (A. 1000, 969-970, 868-869, 808, 956-958, 1210-1212) Proof that this document was born in sin was part of petitioner's proof of fraud — it helped establish Tandy's scienter; it also disproved Tandy's contract counterclaim, which was based, in part, on what Tandy claimed was a net-worth deficit arising out of an inventory overvaluation; and it virtually assured the jury finding that the conversion (impoundment) was done with malice and in bad faith. The evidence that proved the unreliability of this document was offered both in support of petitioner's fraud theory and in opposition to respondent's contract counterclaim.

An arbitrator will necessarily hear this evidence, just as a court and jury already have.

5. *Offer to Buy Inventory.* After the acquisition agreement had closed and respondent had begun the systematic process of writing down the value of the Parker inventory, disregarding the pre-closing representations, Patrick J. Parker, the president of P. J. Parker, Inc., offered to buy all the marked-down inventory at a price that would prevent there from being any net-worth deficiency attributable to inventory. (A. 335-336, 431-432, 1352-1353) Respondent rejected that offer, and insisted on its write-down, to maintain its claim to the escrowed stock. (A. 335-336) That evidence was undisputed. It proved fraud (scienter), it disproved respondent's claim that Parker had breached the net worth warranty, and it therefore demonstrated that the impoundment was an act of conversion.

The evidence establishing this offer and rejection has already been heard by a judge and jury, but as things stand now, an arbitrator will have to hear it again.

6. *Impoundment.* The act which damaged petitioner was respondent's letter to the escrow agent impounding the escrowed stock (PX 38; A. 1982). That letter was written six months *before* Price Waterhouse had delivered its opinion; it was written at a time when the only draft of the Price Waterhouse report (PX 29) — a draft never disclosed to petitioner and obtained only through discovery — showed petitioner to be entitled to

all the escrowed stock[11]; it was written *after* respondent had rejected the offer to buy the allegedly overvalued inventory at book value (A. 335-336); it was written at a time when respondent was selling Parker's inventory at prices *exceeding* the marked-down figures which respondent had insisted upon (A. 997); it was written after respondent had fired Pat Parker for his refusal to accept a "compromise" valuation of inventory (A. 333-334, 337, 340, 1380); it claimed as Parker liabilities management insurance benefits which respondent had *terminated* after the closing (A. 1214, 1982, 1998; PX 38); it further claimed as liabilities certain life and hospitalization insurance benefits as to which respondent had then received (but not disclosed) two legal opinions stating that these liabilities would terminate with the imminent expiration of the union contracts providing them (PX 44; DX 56; A. 1118-1119, 1996, 2066, 1217); and it was written at a time when respondent had been advised by Price Waterhouse that generally accepted accounting principles did not require accrual of either management vacation pay or life and hospitalization insurance for union employees (PX 29 [paragraph 2, p. 2]; A. 1893).

Based on these facts, the jury found that respondent had acted in bad faith and with malice in impounding the stock, and awarded $3,000,000 in exemplary damages (Issues 9-10A; A. 147).

The act of impoundment was the act which both consummated

[11]Net worth, per PX 29, was $1,940,000, only $17,000 less than the warranty figure; the $93,000 Touchette expenditure had been subtracted from net worth in arriving at the $1,940,000 total; adding that sum back (in accordance with respondent's representation, as confirmed by the accountants — A. 1879, 499-502) there would have been no breach of warranty.

the fraud and converted petitioner's stock. The jury had heard the evidence proving the maliciousness of this tort. An arbitrator will, too — because petitioner's conversion claim is presumably arbitrable, even though it is inseparable from petitioner's fraud claim.

The waste of what lies ahead is evident. The ends of public and private economy and prompt resolution of controversies, so often described as the primary advantages of arbitration, are hardly advanced by the decision below — not in this case, of course, nor in any other. In *this* case, an arbitrator will hear facts on which a jury verdict of fraud has already been handed down; and petitioner will be required to prove twice, if not three times, what he has already proved once — that respondent's claim to the escrowed stock was and is knowingly groundless. In all *subsequent* cases, this decision will first baffle trial courts and lawyers alike, then hang like a deadly pall over whatever decisions are initially made. Petitioner deserves a better holding, and trial courts, lawyers, and businessmen considering arbitration agreements — justice — deserves a better opinion. The decision below is wasteful, inscrutable, unpredictable and unfair. It should be reversed.

2. THE DECISION BELOW IMPROPERLY RECONCILES THE FEDERAL POLICY FAVORING ARBITRATION WITH THAT PRECLUDING WAIVER OF THE RIGHT TO LITIGATE CLAIMS OF SECURITIES FRAUD.

The cases favoring remedial application of the federal securities laws are at least as numerous and as authoritative as those favoring arbitration. Compare *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) with *Galt v. Libbey-Owens-Ford Glass*

Co., 376 F.2d 711, 714 (7th Cir. 1967). The instant case and others like it present an undeniable tension between the two policies. This Court has established the proper accommodation:

> Two policies, not easily reconcilable, are involved in this case. Congress has afforded participants in transactions subject to its legislative power an opportunity generally to secure prompt, economical and adequate solution of controversies through arbitration if the parties are willing to accept less certainty of legally correct adjustment. On the other hand, it has enacted the Securities Act to protect the rights of investors and has forbidden a waiver of any of those rights. Recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act.

Wilko v. Swan, 346 U.S. 427, 438 (1953). Based on this holding, the Third Circuit recently observed that "the existence of countervailing federal policies . . . makes cases showing an hospitable judicial attitude to the construction of arbitration clauses inapposite." *Ayres v. Merrill Lynch*, 538 F.2d at 536, n. 9, *supra*.

The decision below conflicts with these principles. Ten days of trial involving 22 witnesses, over 100 documentary exhibits, and careful consideration by a jury, plus extraordinarily expensive merits-briefing on appeal and no less than four years of litigation — all is to be wasted in the interest of a "prompt economical and adequate solution" that is no longer possible — and never was possible without the benefit of discovery afforded by judicial procedures. We ask this Court to recall its own view of the relative disadvantages of arbitration:

> [T]he factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as *discovery*, compulsory process, cross-examination, and testimony under oath, are often *severely limited or unavailable*.

Alexander v. Gardner-Denver Company, 415 U.S. 36, 57-58 (1974) (emphasis supplied). Many of the indicia of fraud in this case were the product of discovery. To give but a few examples: petitioner discovered PX 32 (a memorandum revealing respondent's pre-closing plan to write down the value of the Parker inventory (A. 1926), PX 41 (a fraudulent inventory certificate — see pp. 16-17, *supra*), and PX 29 (a draft of the Price Waterhouse audit report showing petitioner to be entitled to all the escrowed Tandy stock — see n. 11, *supra*, and accompanying text) well after filing the lawsuit. These and other discoveries resulted in an amended complaint in which petitioner's claim of fraud was pled with unmistakable independence.

The Court of Appeals would have had petitioner proceed straight to arbitration and forego his right to discover, and, to a large extent, prove the extent of the fraud visited upon him. It was no doubt to avoid the unfairness of results of this nature that this Court rendered its *Wilko* and *Alexander* rulings, and that the formerly prevailing rule was to deny arbitration when arbitrable and nonarbitrable claims were joined in such a way that some of the same facts formed the basis of both. The decision below ignores these considerations. Its result therefore conflicts with the spirit of *Wilko* and its progeny, and it should be reversed.

There is more than irony here. This is fundamentally unfair. Based on petitioner's original complaint,[12] neither *Wilko v Swan*

[12]The Fifth Circuit's arbitration order asserts that petitioner's 10b-5 claim is necessarily "dependent" upon his having lost the dispute (raised by respondent's counterclaim and by petitioner's claim for specific performance) concerning what the acquisition agreement meant. 543 F.2d at 543. This "dependency" notion was grounded upon the Fifth Circuit's analysis of "the claims made in the original complaint." *Id.*

The original complaint did couch one (but only one) part of petitioner's fraud claims in terms of an alternative theory of recovery — those in Count IV (A. 14-15); those in Count VI were also non-arbitrable, but were never pleaded as being "dependent" upon any other contentions, something which the Court of Appeals overlooked. But when discovery revealed the pervasiveness of respondent's fraud (see p. 21, *supra*), petitioner amended the complaint to charge respondent with fraud "whether or not" petitioner prevailed on the dispute over the meaning of the contract. (A. 97) The amended complaint plainly stated the independent viability of petitioner's securities fraud allegations. Petitioner went to trial on the amended complaint, and proved that quite apart from the quarrel over the meaning of the acquisition agreement, respondent had committed a serious fraud, begun with representations inducing Parker to agree to be acquired (A. 148-158; special issues 11-17), followed by a systematic failure to perform each such promise, and consummated by a malicious and knowingly unfounded impoundment of the escrowed Tandy stock. (A. 147; special issues 9-10)

The law is settled that an appellate court should only examine the most recent amended complaint in reviewing the decisions of the district court, for the amended complaint supersedes and renders "non-existent" the original complaint. *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967); *Lubin v. Chicago Title and Trust Company*, 260 F.2d 411, 413 (7th Cir. 1958); *Nisbet v. Van Tuyl*, 224 F.2d 66, 71 (7th Cir. 1955); *Proctor & Gamble Defense Corp. v. Bean*, 146 F.2d 598 (5th Cir. 1945); *Bullen v. DeBretteville*, 239 F.2d 824 (9th Cir. 1956); *cert. denied* 353 U.S. 947; *Borel v. United States Cas. Co.*, 233 F.2d 385, 388 (5th Cir. 1956) [superseded pleading cannot be used as a legal admission]. Zeroing in on the original complaint, the Fifth Circuit here treated petitioner's alternative pleading of fraud as a legal admission that petitioner's fraud claims were legally "dependent" on petitioner's losing the contract quarrel. This focus on the original complaint was error; that complaint was amended in the one respect which the Court of Appeals here found so important, and to ignore that amendment was not only to err, but to create a conflict with (i) the foregoing decisions of other circuits, and (ii) prior decisions of the Fifth Circuit itself.

nor §29(a) of the Exchange Act means anything if a proven case of fraud in violation of Rule 10b-5 can be tossed out on the strength of a contractual arbitration clause and §3 of the Federal Arbitration Act.

CONCLUSION

The decision below did not reach the merits. It ignored the fact that petitioner has proven fraud under the federal securities laws, and ordered arbitration of a dispute already fully litigated. It disregarded the fact that an arbitrator will have to hear the same facts as have already persuaded a jury to find fraud, and as may be heard by yet a third dispute-solving body. It deprived the trial court of discretion in deciding whether a dispute should be arbitrated or tried, and it did so by adopting a policy of *de novo* review of such decisions. It permitted respondent the unprecedented luxury of a free look at a jury verdict, without even requiring an *attempt* to get interlocutory review of the arbitration question. It left the law of arbitrability in a state of hopeless confusion. It based its holding on a superseded pleading. It repudiated the underlying premise of this Court's decision in *Wilko v. Swan*, and, worst of all, it reached a result that is enormously wasteful and unfair — to petitioner, to the trial court, and to all other lawyers and trial judges who must try now to guess which forum the appellate court will ultimately prefer.

For all these reasons, petitioner respectfully prays that this Court issue a writ of certiorari to review the judgment and opinions of the Fifth Circuit.

Respectfully submitted,
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Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, Marvin S. Sloman, counsel for Harper Sibley, Jr., petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on May 19, 1977, I served three copies of the foregoing Petition for Writ of Certiorari on respondent herein, by hand-delivering same to Warren W. Shipman III, at his office at 1800 Commerce Building, Ft. Worth, Texas, and to Cecil E. Munn, at his Office at 1800 First National Bank Building, Fort Worth, Texas.

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APPENDIX

1. Opinion of the United States District Court for the Northern District of Texas, Dallas Division.

In the

United States District Court

For the Northern District of Texas
Dallas Division

HARPER SIBLEY, JR.
v.
TANDY CORPORATION, ET AL. } *Civil Action 3-7300-B*

MEMORANDUM OPINION AND ORDER

On June 12, 1973, plaintiff Harper Sibley, Jr., filed his six count complaint in the above styled and numbered cause seeking the release of certain escrowed stock, reformation of a merger agreement, money damages, and exemplary damages all arising out of the merger of P. J. Parker, Inc., with and into HTT, Inc., a wholly owned subsidiary of defendant Tandy Corporation.

Plaintiff asserts that this action arises under 15 U.S.C. 78j(b) (1970) (Section 10b of the Securities Exchange Act of 1934) and the rules promulgated thereunder with resulting pendent jurisdiction of the state common law and statutory claims. There is an additional allegation of diversity jurisdiction.

Defendant Tandy filed a Motion to Stay Proceedings on July 24, 1973, contending *inter alia* that the parties had agreed contractually to arbitrate any disputes arising out of the merger

and that arbitration agreement is enforceable under the Federal Arbitration Act, 9 U.S.C. 1 *et seq.* (1970).

After a careful examination of the pleadings and the briefs submitted by counsel, the Court is of the opinion that arbitration would be inappropriate in this cause and, therefore, declines to enter an order that would stay the proceedings.

The Plan and Agreement of Merger executed by P. J. Parker, Inc. and HTT, Inc. is, a ". . . contract evidencing a transaction involving commerce . . ." that contains an arbitration agreement and comes, therefore, within the scope of the Federal Arbitration Act. 9 U.S.C. 2 (1970). "Once a dispute is covered by the Act, federal law applies to all questions of interpretation, construction, validity, revocability, and enforceability." *Coenen v. R. W. Pressprich Co.*, 453 F.2d 1209, 1211 (2nd Cir.), *cert. den.* 406 U.S. 949 (1972). This is the accepted rule in both the federal judiciary and in the Texas judiciary. *See Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1067 (2nd Cir. 1972); *Collins Radio Co. v. Ex-Cell-O Corp.*, 467 F.2d 995, 998 (8th Cir. 1972; *Coenen v. R. W. Pressrich, supra; Hart v. Orlon Ins. Co.*, 453 F.2d 1358, 1361 (10th Cir. 1971); *Boston & Maine Corp. v. Chicago, Burlington and Quincy R.R.*, 381 F.2d 365 (2nd Cir. 1967); *Lummas Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 86 n.4 (2nd Cir.) *cert. den.* 368 U.S. 986 1961); *Robert Lawrence Co. v. Devonshire Fabrics, Inv.*, 271 F.2d 402 (2nd Cir. 1959), *cert. granted* 362 U.S. 909 (1960), *cert. dismissed pursuant to stipulation of counsel* 364 U.S. 801 (1961); *Mamlin v. Susan Thomas, Inc.*, 490 S.W.2d 634 (Tex. Civ. App. 1973).

Plaintiff's complaint may be analysed as follows: (1) Count IV alleges a violation of rule 10b-5 of section 10b of the

Securities Exchange Act of 1934, 15 U.S.C. 78j(b) (1970): (2) Counts I, II, III, V and VI allege claims grounded in the contract of merger relating to defaults on the part of defendants or reformation of the merger agreement.

Counsel for both parties agree that section 29 of the Act, 15 U.S.C. 78cc (1970) precludes submission of Count IV of the Complaint to arbitration, *see Wilco v. Swan*, 346 U.S. 427 (1953); however, defendant argues for the severance and submission to arbitration of the remaining counts.

But Counts I, II, III, V and VI of the Complaint are so intertwined with the rule 10b-5 allegations in Count IV that to submit any of those counts to arbitration would be to violate the mandate of section 78cc of the Act. This is especially true when one considers that Counts I, II, III, V and VI involve intricate questions of law and findings of fact that, when rendered, would likely resolve the issues presented in Count IV.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that the Motion to Stay Proceedings filed in this cause by defendant Tandy is and the same is hereby DENIED.

SIGNED and ENTERED this 10 day of September, 1973.

SARAH T. HUGHES
United States District Judge

2. Principal Opinion of the United States Court of Appeals for the Fifth Circuit.

Harper SIBLEY, Jr., Plaintiff-Appellant, Cross Appellee,

v.

TANDY CORPORATION et al., Defendants,

Tandy Corporation, Defendant-Appellee, Cross Appellant.

No. 75-1243.

United States Court of Appeals,
Fifth Circuit.

Dec. 3, 1976.

Rehearing Denied Feb. 18, 1977.

Robert L. Blumenthal, Rod Phelan, Earl F. Hale, Jr., Dallas, Tex., for plaintiff-appellant, cross appellee.

Warren W. Shipman, III, Donald H. Ray, Charles L. Stephens, Cecil E. Munn, Sloan B. Blair, Fort Worth, Tex., for Tandy Corp.

R. F. Snakard, Fort Worth, Tex., for Ft. Worth Nat'l Bank.

Appeals from the United States District Court for the Northern District of Texas.

Before GEWIN, GODBOLD and SIMPSON, Circuit Judges.

GODBOLD, Circuit Judge:

This case originates from a corporate merger agreement containing a provision for arbitration of differences arising from the agreement. Differences arose between the parties to the agreement, and one party sued asserting breach of contract claims, federal and state securities law claims, and common law fraud claims. We hold that the district court erred in refusing to require arbitration of the contract claims and to stay the securities and fraud claims pending arbitration.

The merger agreement was between Tandy Corporation and P. J. Parker, Inc., a holding company. Parker's primary asset was ownership of Hickok Manufacturing Company. Hickok and Parker were experiencing serious financial difficulties. The management of Parker began negotiating with the Tandy management with the object of merging Parker into a specially-formed Tandy subsidiary. After several months of intense negotiations, Tandy and Parker entered into a written agreement calling for a statutory merger between Parker and a newly created Tandy subsidiary.

Parker shareholders were to be paid in Tandy stock, two thirds upon surrender of the Parker shares and the remaining third to be held by Fort Worth National Bank as escrow agent pending verification of Parker's representation of its net worth. Tandy was to obtain an audit by its accountants to confirm the Parker net worth. The audit and all other accounting matters were to "be handled in accordance with generally accepted accounting principles applied on a basis consistent with those applied with respect to the certified consolidated financial statements of Parker as of December 31, 1970." The agreement provided for arbitration of all disputes arising from the agreement.

According to the audit by Tandy's accountants, Parker's net worth was substantially less than represented. The primary reasons for the difference in figures were: (a) a write-down of $331,492 in the value of Hickok's inventory; (b) a charge of $93,721 against Parker's net worth, incurred as a result of Tandy's cancellation of a computer software contract held by Parker; (c) the inclusion of a liability of $486,016 for the cost of a single premium life and medical insurance policy to cover insurance benefits allegedly owed by Hickok to retired employees; and (d) the inclusion of a liability of $65,000 for accrued management vacation pay. After receiving the audit Tandy ordered the bank to impound the escrowed stock.

Harper Sibley, the person designated in the agreement as the representative of Parker shareholders, brought suit against Tandy. (For convenience we refer to the plaintiff as "Parker.") The original complaint was in six counts, characterized by the district court in this manner:

*** p. 542 ***

> Plaintiff's complaint may be analyzed as follows: (1) Count IV alleges a violation of rule 10b-5 of section 10b of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) (1970); (2) Counts I, II, III, V and VI allege claims grounded in the contract of merger relating to defaults on the part of defendants or reformation of the merger agreement.[1]

By a timely motion Tandy moved to have the contract claims submitted to arbitration and to have the federal securities law claims stayed pending arbitration. The parties and the district judge recognized that under § 29 of the Act, 15 U.S.C. § 78cc

[1]Perhaps, more accurately, there were four contract counts, one federal and one state securities law count, and one common law fraudulent misrepresentation count.

(1970), Count IV was not subject to arbitration. *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953). The court declined, however, to sever the contract counts and to submit them to arbitration, on the ground that they were so intertwined with the securities law claim that submitting them to arbitration would violate § 78cc, saying:

> This is especially true when one considers that Counts I, II, III, V and VI involve intricate questions of law and findings of fact that when rendered, would likely resolve the issues presented in Count IV.

Trial was held in October 1974 and consumed 14 days, 22 witnesses and more than 100 documentary exhibits. The jury verdict consisted of answers to special interrogatories consisting of 34 specific questions.[2] The bulk of the interrogatories related to matters of accounting, i. e., the application of "generally accepted accounting procedures" and the interpretation of corporate financial statements, with particular reference to the four areas of primary controversy — valuation of inventory and inclusion as liabilities of a charge for cancellation of a computer software contract, life insurance premiums, and vacation pay. These were the areas from which arose the differences in valuation of Parker's net worth as represented by it and as reflected by Tandy's audit. Several interrogatories related to pre-agreement representations made by Tandy concerning accounting principles and the treatment of the four specific accounting items in particular controversy.

The court entered judgment awarding $463,853.93 damages to Parker plus delivery of the escrowed shares. Parker appealed on the issue of damages. Tandy cross-appealed on the issue of

[2]There was no general verdict.

liability and the refusal to submit to arbitration. We hold that the court erred when it denied Tandy's motion to submit the contract claims to arbitration and refused to stay the securities fraud claims pending the outcome of that arbitration. We, therefore, reach neither the issue of Tandy's liability nor the issue of damages.

We find no merit in plaintiff's contention that Tandy waived its right to arbitration. The burden on one seeking to prove a waiver of arbitration is a heavy one. *General Guaranty Ins. Co. v. New Orleans General Agency, Inc.*, 427 F.2d 924 (CA5, 1970); *Hilti, Inc. v. Oldach*, 392 F.2d 368 (CA1, 1968). The plaintiff has failed to carry this burden. Tandy filed its motion to stay the very day it filed its answer to Parker's complaint, and it took no actions which could be viewed as being inconsistent with its right of arbitration. Tandy did not waive its right by failing to press an interlocutory appeal of the district judge's denial of its motion to stay arbitration. *General Guaranty, supra.*

The present case squarely raises the problem of what a court should do where arbitrable claims are joined with claims not subject to arbitration. On the one hand, Section Two of the United States Arbitration Act, 9 U.S.C. § 2, makes arbitration clauses in contracts involving commerce "valid, irrevocable and enforceable." Parker's contract claims against Tandy fall *** p. 543 *** within the ambit of the arbitration clause of their agreement, and are thus arbitrable. Their subject matter is peculiarly adapted to arbitration. On the other hand, claims under the Federal Securities Acts, such as Parker's 10b–5 claim, are generally not subject to arbitration under a preexisting arbi-

tration clause. *Wilko v. Swan, supra; Neuman v. Shearson, Hammill & Co., Inc.* 383 F.Supp. 265 (W.D.Tex. 1974).[3]

Here, the district judge ordered all issues tried on the ground that the arbitrable issues were inextricably intertwined with the federally cognizable 10b–5 issues. We agree with the district judge that when it is impractical if not impossible to separate out non-arbitable federal securities law claims from arbitrable contract claims, a court should deny arbitration in order to preserve its exclusive jurisdiction over the federal securities act claims. *Shapiro v. Jaslow,* 320 F.Supp. 598 (S.D.N.Y.1970). However, in this case, the claims were not "intertwined" in the legal sense. Instead we view the 10b–5 claim as being "dependent" upon the contract claims. The difference is subtle yet significant. A comparison of the claims in *Shapiro v. Jaslow, supra,* with Parker's claims illustrates the difference. In *Shapiro,* one of the defendants alleged in a cross-complaint that one of his codefendants committed acts giving rise to rights under both the common law (arbitrable) and under the federal securities law (non-arbitrable). The two claims in *Shapiro* were not factually severable. An arbitrator making a decision on the common law claims would have been

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[3]While there is language in *Sherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974), which suggests a colorable argument that the doctrine of *Wilko v. Swan, supra,* does not apply to actions brought under the 1934 Securities Exchange Act, we adhere to the view that the similarities between the 1933 Securities Act and the 1934 Exchange Act far outweigh any differences which might exist, and that the widely held view that *Wilko* is applicable to both the 1933 and 1934 Acts is still correct. *See, e. g., Moran v. Paine, Webber, Jackson-Curtis,* 389 F.2d 242, 245 (CA3, 1960); *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178, 183 n. 5 (CA2, 1964); *Starkman v. Seroussi,* 377 F.Supp. 518 (S.D.N.Y.1974).

impelled to review the same facts needed to establish the plaintiff's securities law claim.[4]

Parker's suit against Tandy is a horse of a distinctly different color. The original complaint, the amended complaint (filed a year after arbitration was denied), the record of the trial, the numerous special interrogatories submitted to the jury, and the opinion of the court rendered in entering judgment on the jury findings, reveal this to be essentially a dispute over corporate valuations centered around complex issues of accounting and valuation. The securities law claim was the rather small tail to a much larger dog.

An even more important consideration is seen when Parker's claims made in the original complaint are arranged in the sequence that logic commands. First is the "frontline" assertion, a plain vanilla suit for what amounts to specific performance of a contract which, according to Parker, unambiguously means what Parker says it means. Parker asserts that under such a contract it has performed (or perhaps is excused from further performance), and that Tandy has failed to perform because its accountants did not properly value inventory, did not use

[4]For another securities case where arbitration was denied because the arbitrator and court would have to deal with the same facts *see Stockwell v. Reynolds & Co.*, 252 F.Supp. 215 (S.D.N.Y.1965).

While we hold that the logic of decisions such as *Shapiro, supra,* and *Stockwell, supra,* has no application to the relationship between the plaintiff's federal securities and contract claims, we recognize that the reasoning in those cases applies to the relationship between the plaintiff's federal securities law claims and his state securities law claims and common law fraud claims. If an arbitrator were to resolve the plaintiff's Texas securities law and common law fraud complaints, he would be dealing ith the same facts which form the basis for plaintiff's claim of federal securities law violations. Therefore, we hold that plaintiff's claims under the Texas securities laws, like his claims under the federal securities laws, are not arbitrable.

proper accounting methods in valuing inventory, improperly handled the three liability items (computer contract, life insurance and vacation pay), and did not unqualifiedly ***p. 544*** certify their audit. Tandy having breached, Parker asks that the escrowed shares be delivered to it.

Parker's first fall-back claim is that the contract may be ambiguous. If it is, then resort must be had to oral representations made by Tandy. This extrinsic matter will resolve ambiguities in Parker's favor, or will require reformation of the contract because it does not exemplify the "true understanding" between the parties. Under the contract, either construed or reformed as Parker desires, Parker is entitled to win because Tandy breached that contract.

Up to this point, Parker's claims are seen as pure claims on the contract involving the terms of the merger agreement (as written, or as construed or reformed) and the application of those terms. If either of these positions by Parker were sustained before an arbitrator the controversy would be entirely or largely at an end except for the arbitrator's making adjustments in the valuation figures if appropriate. Thereafter Parker could hardly contend in a courtroom that Tandy's representations had fraudulently induced it to enter into a written contract which: (1) meant what Parker said it meant, that is, was consistent with Parker's contentions, or (2) embodied in it the oral representations made by Tandy and thereby set out the correct understanding between the two parties. Tandy's representations are irrelevant with respect to (1) or are incorporated into the contract under (2) as part of the "true agreement" between Parker and Tandy.

Parker's second fall-back position is that its management

was fraudulently induced by the oral representations of Tandy management to enter into a written contract which *differed* from the previously-made oral representations. Here the securities claim arises. The very existence of this claim is predicated upon Parker's first two positions being resolved *against* Parker. Unquestionably, the facts are to some degree intertwined and overlapping. But all of the policy reasons supporting arbitration apply here where arbitration may establish that a securities claim does not exist because the claimant's own assertions with respect to arbitrable issues are correct.[5] The parties, by their agreement, committed the resolution of contractual disputes to arbitration. Both the policy behind the United States Arbitration Act and considerations of judicial economy required that Parker's contractual claims be submitted to arbitration and that the federal securities law claims be stayed pending the outcome of those proceedings. Cf *Kavit v. A. L. Stamm & Co.*, 491 F.2d 1176 (CA2, 1974); *Black v. Econo-Car Int'l, Inc.*, 404 F.Supp. 600 (D.Mass.1974); *Harman Electrical Construction Co. v. Consolidated Engineering Co.*, 347 F.Supp. 392 (D.Del. 1972).[6]

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[5]Plaintiff itself has recognized that its securities law claim cannot exist unless the contractual dispute between it and Tandy is resolved in the latter's favor. In the plaintiff's original complaint its federal securities law count is phrased as follows:

> "Alternatively, if the Merger Agreement is found unambiguous . . . then Tandy . . . employed a device scheme or artifice to defraud."

[6]Dependency is a two-way street, i. e., there exist situations where the arbitration should be stayed pending resolution of the securities law claims. For a case illustrating a situation where the arbitrable claims should be stayed *see Frier Industries, Inc. v. Glickman*, [1974-1975 Decisions] Fed.Sec.L.Rep. ¶94,845 (S.D.N.Y.1974). Moreover, if the claims are factually and legally independent, the court may allow both the arbitration proceedings and the trial of the securities law claims to go forward simultaneously. *E. g., Macchiavelli v. Shearson, Hammill & Co., Inc.*, 384 F.Supp. 21, 31 (E.D.Cal.1974). *See also Sam Reisenfeld & Son Import Co. v. S. A. Eteco*, 530 F.2d 679 (CA5, 1976).

We reverse and remand with directions that plaintiff's claims, other than those alleging violations of federal and state securities laws, and common law fraud claims be submitted to arbitration in accordance with the parties' agreement, and that resolution of the Texas and federal securities law claims and common law fraud claims be stayed pending the outcome of the arbitration proceedings.

REVERSED and REMANDED with directions.

3. Opinion of the United States Court of Appeals for the Fifth Circuit, Denying Rehearing.

Harper SIBLEY, Jr., Plaintiff-Appellant, Cross Appellee,

v.

TANDY CORPORATION et al., Defendants,

Tandy Corporation, Defendant-Appellee, Cross Appellant.

No. 75-1243.

United States Court of Appeals,
Fifth Circuit.

Feb. 18, 1977.

Appeals from the United States District Court for the Northern District of Texas.

ON PETITION FOR REHEARING
Before GEWIN, GOLDBOLD and SIMPSON, Circuit Judges.

PER CURIAM:

The linchpin of Parker's petition for rehearing concerns this sentence in our opinion, 543 F.2d at 542: "By a timely motion Tandy moved to have the contract submitted to arbitra-

tion and to have the federal securities law claims stayed pending arbitration." Parker correctly points out that Tandy's *motion* did not ask for a stay of the nonarbitrable federal securities law claims pending arbitration but only the arbitrable claims. This being so, Parker asserts that with respect to the securities law claims the results of the trial should be permitted to stand. Parker's petition makes it necessary that we state at greater length what occurred in the district court with respect to possible stays.

Parker responded to Tandy's motion to stay with a brief urging the district court to deny the motion and to hold that the entire dispute must be tried in the court because all issues were indistinguishable, inextricably intertwined and incapable of severance. Alternatively, Parker asked that if a severance was granted the court enter an order that arbitration should not begin until after the securities law claims had been tried. Tandy responded with a reply brief [1] in which it requested that trial of the securities law claims be stayed.

In short, the parties squarely put before the court the question of what it should do: should it try all issues, or carve out the arbitrable issues, and, if the latter, should it stay trial of the securities claims until the arbitration was concluded, or stay arbitration until the trial concluded, or stay neither and permit both trial and arbitration to proceed. The court accepted Parker's primary argument. It ordered that all issues should be tried before the court and declared that arbitration of any issues was inappropriate and would violate the federal securities law.

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[1] It pointed out various of the considerations noted in our opinion which mandated that arbitration should be first in time.

This case is "essentially a dispute over corporate valuations centered around complex issues of accounting and valuation. The securities law claim was the rather small tail to a much larger dog." 543 F.2d at 543. As we explained in our opinion, both the nature of the dispute and the claims made by Parker cried out for arbitration's being first in time. Parker, however, successfully urged upon the court its primary position that everything must be settled in court and that nothing could be arbitrated. It not only prevented arbitration's being first in time but also secured a declaration that foreclosed the possibility of arbitration and trial proceeding simultaneously. Having persuaded the court to choose a course 180 degrees off the correct one, Parker has little force to his argument that he should be permitted to enjoy the substantial benefits of a trial that should not have been held. We have previously rejected such an argument, *General Guaranty Ins. Co. v. New Orleans General Agency, Inc.*, 427 F.2d 924, 929 (C.A.5, 1970), and we do so again. The argument is inconsistent with the policies underlying the Arbitration Act. It is inconsistent with judicial recognition of arbitration as a socially desirable instrumentality for the settlement of disputes outside the courtrooms of beleaguered courts. In the long run, acceptance of it would ill serve both the courts and those who voluntarily contract to arbitrate their disputes.

The suggestion is made that our opinion cuts off Parker from asserting after arbitration any securities law claims it might have. We have not intended to suggest that. We did, and do, suggest that in a practical sense arbitration first in time might have disposed of this suit and, if not, might have limited its scope and clarified it. And it still might.

The petition for rehearing is DENIED.